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Attorney for Plaintiff, C.S

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

C.S., by and through his Conservator,	)	CASE NO.: 08 CV 0226 W (AJB)
MARY STRUBLE, on behalf of himself	)	DECLARATION OF TANIA
and all others similarly situated,	)	WHITELEATHER, ESQ. IN SUPPORT
	)	OF TEMPORARY RESTRAINING
	)	ORDER
Plaintiff,	)	
	)	
v.	)	Date: To Be Set
	)	Time: To Be Set
CALIFORNIA DEPARTMENT OF	)	Judge: Hon. Thomas J. Whelan
EDUCATION, a State Agency,	)	
Defendant.	)	

1           DECLARATION OF TANIA L. WHITELEATHER

2           I, Tania L. Whiteleather, have personal knowledge of  
3 the following and can, if called, testify to the same in  
4 a court of law. I am the attorney licensed to practice  
5 law in the State of California. For the past twelve  
6 years, my primary area of practice has been in special  
7 education and related areas.

8           This declaration is provided in support of the  
9 application for temporary restraining order and  
10 preliminary/permanent injunction in United States  
11 District Court Case SCCA 08 CV 226 W (AJB).

12          Prior to July 1, 2005, I appeared in cases in front  
13 of the California Special Education Hearing Office, or  
14 "SEHO." When the Office of Administrative Hearings,  
15 "OAH," entered into an agreement with the California  
16 Department of Education ("CDE") to hear administrative  
17 due process hearings, I continued to represent students  
18 and their parents in IDEA hearings before that tribunal.

19          Since July 1, 2005, I have filed approximately thirty  
20 due process complaints. With the filing of each  
21 complaint, I have specifically requested that OAH provide  
22 my office with the qualifications and training of each of  
23 mediator (an administrative judge) assigned to that case.  
24 Not once has OAH provided me with the requested informa-  
25 tion.

26          On September 11, 2007, along with three other student  
27 representatives, I met with Jim Belotti, Shane Berli, and  
28 Greg Rousseve, all from CDE. We explained to the CDE

1 representatives that OAH's administrative judges were  
2 required, pursuant to the OAH-CDE contract, to have  
3 eighty hours per annum of training. Mr. Belotti argued  
4 with us, contending that eighty hours was only required  
5 for the first year that an administrative judge was with  
6 OAH; we pointed out the clear language of the agreement  
7 to the contrary. Despite the claims of OAH and its  
8 employees that the OAH administrative judges have had  
9 the required eighty-hours per year of training required  
10 under the OAH-CDE contract, the records of OAH training  
11 CDEs not indicate that amount of training for most of the  
12 administrative judges.

13 During the past two and a half years with OAH, as I  
14 represented students at hearing, I heard OAH administra-  
15 tive judges discuss their training. Five such judges  
16 told all present at hearing that they did not have  
17 training in special education, asking for explanations  
18 during the hearing for terminology used. Many of the  
19 mediators, who were also administrative judges, made  
20 similar statements: they were unfamiliar with terms,  
21 concepts, and laws in special education but were open to  
22 learning.

23 Each case that I have brought to hearing with OAH has  
24 been appealed. The administrative judges in those cases  
25 have indicated their lack of training as follows:

- 26 1. One judge did not understand the meaning of  
27 "compensatory education." On the record, I  
provided a basic explanation of that remedy  
to the judge.

28 His decision was partially reversed on  
appeal.

1 2. One judge held that a County Mental Health  
2 agency was entitled to receive all records,  
3 of every kind, of the student's, contrary  
4 to HIPPA and confidentiality requirements.

5 On appeal, the parties settled the matter  
6 regarding records, as requested (but  
7 denied) by the Student at hearing.

8 3. One judge ruled that IDEA 2004 had changed  
9 the requirement that a teacher attend a  
10 child's IEP. His decision failed to even  
11 mention the experts or their testimony at  
12 hearing about Student's cochlear implant.  
13 In fact, the attendance of the child's teacher  
14 continued to be required.

15 On appeal, the federal court reversed the  
16 judge.

17 4. One judge held that the parents were at  
18 fault for the school district's failure  
19 to make a written offer of FAPE because  
20 the parents had not cooperated in the  
21 scheduling of a continued IEP. In fact,  
22 it was the district's duty to hold an  
23 IEP, even if the parents did not cooperate.

24 That matter is on appeal.

25 5. One judge, when a severely developmentally  
26 delayed child suffered seizures as he was  
27 being watched by a school nurse in a room  
28 near the hearing room, and when the  
mother asked to have accommodations  
for her child's seizures, told the mother  
that her presence was not required at  
the hearing, and that no accommodations  
would be given to the parent or child.  
The mother settled, on terms that would  
"shock the conscience" to protect her  
son and to stop his seizures.

6. One judge denied the student the right  
to hearing on the issue of stay-put,  
holding that a pre-hearing order  
precluded the student's right to hearing  
on the issue.

That matter is on appeal.

7. One judge, handling a case that involved  
the CDE case-management system for  
special education, "CASEMIS," told  
the parties' representatives that she  
did not know what CASEMIS was. Knowledge

1 of that special education system is vital  
2 to the Student's case.  
That matter is pending.

- 3 8. One judge held that an elementary  
4 student's hospitalization for suicidal  
5 ideation during the school year did not  
interfere with his education.

6 That matter is on appeal.

- 7 9. One judge argued with my client's issue  
8 regarding "meaningful progress," and  
9 insisted that IDEA required only "some"  
educational progress. She attempted to  
change Student's issues at hearing.

10 The parties settled, in spite of the  
administrative judge's statements.

- 11 10. One judge, hearing my client's issues  
12 regarding the District's failure to  
13 allow the parent to participate in the  
14 IEP process, told all parties that she  
15 didn't want to dwell on procedural  
problems (which were the most important  
portion of the complaint). She did not  
understand the importance of the parent's  
participation under IDEA.

16 That matter is pending.

- 17 11. One judge, in mediation, where she had  
18 not seen the evidence, told the Student  
19 to settle because she would lose. The  
biased position of the mediator denied  
Student an important part of due process.

- 20 12. One judge held that the Student was  
21 entitled to reimbursement for tuition  
22 at a non-public school when his school  
23 district had denied a FAPE (Free and  
24 Appropriate Public Education). However,  
because the parent had drive the child  
to and from school, the judge held that  
the parents were not entitled to reim-  
bursement for transportation, contrary  
to state and federal law.

25 The decision was appealed, and the  
26 parents obtained transportation reim-  
bursement through settlement of their  
27 federal court case.

28 For many of my due process hearings, OAH has not

1 provided a decision in a timely manner. In fact, several  
2 hearing decision were rendered long after the 45-day  
3 timeline: a decision in Case N 2005070425 was issued six  
4 months after the last day of hearing; in N 2005070523,  
5 eighty days after the last day of hearing; in Case N  
6 2005110360, six months after the last day; in Case N  
7 2005070130, seventy days after the last day; in Case N  
8 2005070442, six months after the last day. The delays in  
9 OAH's decision have meant further delay in appealing the  
10 decisions for the students to the courts and a further  
11 denial of FAPE for my disabled clients.

12 Finally, of greatest concern is OAH's complete and  
13 utter failure to comply with state law and its contract  
14 with CDE to provide a list of free- or reduced-costs  
15 representatives to parties. Since July 1, 2005, OAH  
16 failed, until very recently, to provide any list  
17 whatsoever to parents unless the parents knew to ask for  
18 such list. Even then, the list provided was outdated,  
19 containing names of deceased student representatives, as  
20 well as many individuals who no longer practiced special  
21 education. I attended the OAH Advisory Committee  
22 Meeting on October, 2007. At that meeting, I asked the  
23 presiding judge, Sherianne Laba, why parents were not  
24 being given a list of no- or low-cost representatives.  
25 She stated that OAH was waiting for CDE to define who  
26 could be on the list. The representatives from CDE, who  
27 were present, simply told the crowd that CDE was "working  
28 on it." To date, there is no no- or low-cost list of

1 representatives that is current and is being provided to  
2 parents who file or who are filed against by school  
3 districts, for due process hearings, although I have been  
4 told by OAH that one will be prepared soon.

5 As of today's date, CDE and OAH have yet to provide  
6 parties with a list of free- or reduced-cost represen-  
7 tation, as required by C.E.C. § 56502. CDE has made no  
8 attempt, to date, to contact many of us in the state who  
9 regularly practice in special education, and who are  
10 known to OAH as special education attorneys or advocates,  
11 to determine whether we provide free or reduced-cost  
12 representation to disabled students. I have never been  
13 contacted by OAH regarding my inclusion on such a list,  
14 although I offer a low-cost representation for parents in  
15 due process hearings. And, although I spoke with Shane  
16 Berli, a CDE representative overseeing OAH, at the end of  
17 January, about the list, and although I sent a letter to  
18 Mr. Berli during the first week of February, 2008, to ask  
19 that I be added to the list, I still have neither been  
20 added to the OAH list nor been contacted about my charges  
21 or rates to parents. Mr. Berli told me that, although he  
22 couldn't disclose information, that something would be  
23 happening in March, 2008.

24 The direct result of the failure of CDE to provide  
25 a list of representatives to parents of disabled students  
26 has been the inability of parents to participate in the  
27 due process hearings. Without knowledge or training in  
28 the law, and appearing opposite trained school district

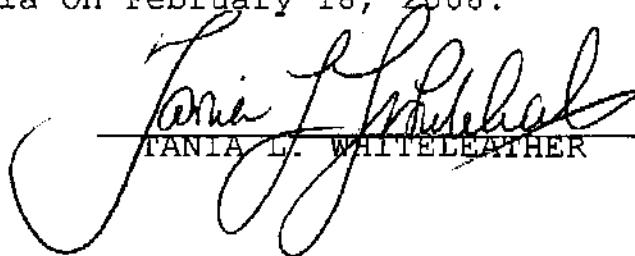


1 attorneys or advocates, those parents stood no chance to  
2 win at hearing. I have been contacted by at least six  
3 parents who have been "sued" by their school district in  
4 due process hearing and have not been given a list of  
5 advocates or attorneys and have never been offered any  
6 assistance, by the OAH mediators, with their part in the  
7 due process case.

8 Despite CDE's knowledge that it has failed to provide  
9 parents with the representative list, since July, 2005,  
10 CDE has not updated the list properly to comply with  
11 state law. Parents are being denied the vital  
12 information they require to access representation in the  
13 very specialized field of special education and, as a  
14 result, are being denied due process at IDEA hearings,  
15 all because CDE has failed to update, prepare, and  
16 provide the representative lists to them.

17 As of the time of this declaration, I have now  
18 learned of a request by Senator Correa for an audit of  
19 OAH by the Joint Legislative Audit Committee. A copy of  
20 that letter, dated February 15, 2008, is attached hereto  
21 and incorporated by reference.

22 Executed under penalty of perjury under the laws of  
23 the State of California on February 18, 2008.

24  
25   
26 TANIA L. WHITELEATHER  
27  
28



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## California State Senate

SENATOR  
LOU CORREA  
THIRTY-FOURTH SENATE DISTRICT



February 15, 2008

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COMMITTEES  
APPROPRIATIONS  
BANKING, FINANCE  
& INSURANCE  
VETERANS AFFAIRS  
CHAIR  
SELECT COMMITTEE ON  
MANUFACTURED HOMES  
& COMMUNITIES  
CHAIR  
SELECT COMMITTEE ON  
INFRASTRUCTURE  
& TECHNOLOGY

Honorable Nell Soto, Chairwoman,  
Joint Legislative Audit Committee  
1020 N Street, Room 107  
Sacramento, CA 95814

**RE: Audit Request for the Special Education Division of the CA Office of  
Administrative Hearings**

Dear Chairwoman Soto,

It has come to my attention through parents and other concerned individuals that there may be serious problems with how the California Office of Administrative Hearings (OAH) has conducted its operations since taking over the special education administrative hearing process. OAH started conducting special education administrative hearings July 1, 2005 and special education mediations starting January 1, 2006. Previously, both processes were operated by the Special Education Hearing Office (SEHO) at McGeorge School of Law.

I am urging you to please review the following list of concerns that have been brought to my attention I believe that an independent investigation of the OAH special education division is urgently needed to inquire about and subsequently address the following:

**Concerns:**

**1. Oversight and Fairness**

- a. Parents have been increasingly frustrated that the California Department of Education (CDE) is not adequately providing necessary oversight over OAH and believe that the system should be more closely scrutinized.
- b. There are questions as to OAH's ability to conduct fair and unbiased hearings. In particular, many parents of children with disabilities believe that OAH's decisions in special education issues have been disproportionately skewed in favor of the school districts. There has been a dramatic shift in hearing outcomes since OAH was granted its contract.

*Audit Request for the Special Education Division of the CA Office of Administrative Hearings continued.*

- d. There are concerns that OAH hearing officers are not being properly trained. This is reportedly resulting in problematic hearing decisions and a dramatically increased number of appeals from administrative decisions to federal and state courts.
- e. OAH appears to have had significant difficulties filling positions and retaining staff, and indeed to have decided to use temporary appointees for many of its special education responsibilities, all of which are problematic for a system that is entrusted with conducting fair and timely hearings.
- f. Problems with special education adjudications are reportedly adversely affecting the timeliness and quality of the agency's decision making in other areas, including regional center hearings which affect many of the same individuals and families as special education cases.

**Objectives of Audit**

- 1. Determine whether adequate oversight is being provided to OAH by CDE.
- 2. Determine whether the funds allocated to OAH are being properly used and allocated and whether restoring the pre-2006 system of independent mediation would save money and improve outcomes.
- 3. Determine the efficacy of the OAH in special education due process and mediation cases and make recommendations with respect to future provisions of special education mediation and adjudication functions.

**Scope of Audit**

The scope of the audit should only encompass the Special Education Division of the Office of Administrative Hearings and CDE's monitoring thereof; there may be some peripheral attention to the impact of the special education workload on OAH's handling of other cases.

Families and advocates have been requesting since spring 2005 that the legislature consider their concerns regarding the proposal to transfer special education mediations and hearings to the Office of Administrative Hearings. We are now almost three years into the transition, and OAH's agreement with CDE is up for renewal. It is critical that the legislature investigate the functioning of a system which shapes the quality of educational services for approximately 1/10 of students, and which indirectly affects the educational programs of many other students and the well-being of millions of Californians.

*Audit Request for the Special Education Division of the CA Office of Administrative Hearings continued.*

- c. Participants in special education hearings from both sides have asserted that OAH's rules are inconsistently applied among its administrative law judges and throughout the state. OAH has not managed to conduct hearings in a fair and timely manner.
- d. Legislative oversight as well as transparency to the public has been hampered by gaps in OAH's reports regarding their activities.

**2. Problematic Use of Funds**

- a. Although OAH obtained the special education contract based on claims it would be more cost-effective, it has repeatedly sought and received supplemental appropriations. It is not clear whether the funds allocated have been appropriately or effectively utilized.
- b. OAH switched to a more expensive mediation system whereby mediators must be attorneys (some are regular administrative law judges and others are pro tem judges solely providing mediation services). Previously, under SEHO, mediators were trained professionals, in many cases educators who were committed to the special education mediation process, but many of them were not attorneys. This switch to a more costly system has been accompanied by a declining success rate for mediations, throwing more cases into costly hearings.
- c. OAH has introduced prehearing conferences and other additional costly, legalistic processes. These hurdles not only cost more for the state to administer, but for both parents and districts to navigate.

**3. Efficacy**

- a. Settlements have dropped dramatically under OAH's authority.
- b. Costly appeals to federal and state courts appear to have become far more common, as decisions are rendered which not only leave one or both sides very dissatisfied but which are also written in ways which parties believe create strong prospects for reversal.
- c. The overly legalistic processes that OAH has implemented have not proven to be more effective at resolving disputes and quickly ensuring that special needs students get appropriate services. Whereas school districts often used to use their own staff for mediations and hearings, they now almost invariably hire outside counsel or refer cases to their growing legal staffs. Parents find that fewer lawyers are handling special education matters, and they are charging more because of the increased cost of the process.

- *Audit Request for the Special Education Division of the CA Office of Administrative Hearings continued.*

In particular, the outcome of many of these hearings may affect the future of many special needs children whose education and future is dependent upon the results of those hearings. An examination of the practices of OAH and their system as a whole is critical in securing the due process rights of the citizens of California.

Thank you for your consideration of this request. If you have questions, I will be happy to speak with you and to put you in touch with people and organizations which can provide additional information.

Sincerely,



LOU CORREA  
Senator, 34<sup>th</sup> District